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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 253

JOHN C. LONG, MARSHALL LONG and
ROBERT W. LONG, individually
and a co-partnership, d/b/a
LONG CONSTRUCTION COMPANY,
Petitioners,
vs.
JOHNS-MANVILLE SALES CORPORATION,
a foreign corporation,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

John C. Long, Marshall Long, and Robert W. Long, individually and a co-partnership, d/b/a Long Construction Company, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case.

OPINIONS BELOW

The Opinion of the District Court is reported at 204 F. Supp. 16, and a copy of its Opinion is printed in Appendix B hereto, *infra*, page 24. The Opinion of the Court of Appeals is reported at 327 F. 2d 611, and a copy of its Opinion is printed in Appendix B hereto, *infra*, pages 17-24. The Order of the Court of Appeals denying a rehearing *en banc* is printed in Appendix B hereto, *infra*, page 16. The Order of the Court of Appeals denying a rehearing is printed in Appendix B hereto, *infra*, pages 15-16.

JURISDICTION

The Opinion of the Court of Appeals reversing the decision of the District Court was filed on February 13, 1964. Then Petitioners filed a Petition for Rehearing *En Banc* and for Rehearing with the Court of Appeals within the twenty-day period permitted for filing the same, provided under Rule 22 of the Rules of the United States Court of Appeals for the Sixth Circuit. The Petition for Rehearing *En Banc* was denied by Order entered on April 16, 1964, and a copy of the Order is printed in Appendix B hereto, *infra*, page 16. The Petition for Rehearing was denied by Order entered on April 27, 1964, and a copy of the Order is printed in Appendix B hereto, *infra*, page 15-16. The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code.

QUESTIONS PRESENTED

Two separate questions are presented for review:

I.

Scope of Review

May the Court of Appeals order summary judgment for the appellant if factual inferences must be drawn from undisputed facts in order to render such judgment and reasonable minds could draw different inferences?

II.

Denial of En Banc Rehearing

Does the expressed policy of the Court of Appeals for the Sixth Circuit to deny rehearings *en banc* of all cases heard originally by a panel contravene Section 46(c) of Title 28, United States Code?

STATUTES INVOLVED

The pertinent statutory provisions are Section 46 of Title 28, United States Code, page 871 of Vol. 62 part 1, U. S. Statutes at Large. The pertinent statutory provisions are printed in Appendix A, *infra*, page 15.

STATEMENT

The basis of jurisdiction of the court of first instance, The United States District Court for the Eastern District of Michigan, was a suit filed, pursuant to the diversity statute, Section 1331, Title 28, U. S. Code, by one Charles Reed

against petitioners to recover damages for personal injuries.

The case with respect to the questions is as follows:

Reed, a workman employed by Johns-Manville Sales Corporation, was injured when a hoist on which he stood was lowered without warning. Johns-Manville Sales Corporation then was performing work at the site of a Ford Motor Company project at Wixom, Michigan, pursuant to a contract it had executed with petitioners, the general contractors. (Appendix B, page 24)

Reed brought suit against petitioners for the injuries sustained which, allegedly, were caused by the negligence of one of petitioners' employees. Thereupon, petitioners joined Johns-Manville Sales Corporation as a third-party defendant upon a claim of indemnity based on an express contract. (Appendix B, page 25)

Reed's rights were determined by stipulation. The controversy remaining was between petitioners and Johns-Manville Sales Corporation. (Appendix B, page 25)

Petitioners moved for summary judgment contending that Johns-Manville Sales Corporation, pursuant to the contract between them, owed a duty to indemnify petitioners against any claims for personal injury connected with the performance of the work even though based on petitioners' negligence. Johns-Manville Sales Corporation, in turn, moved for partial summary judgment contending that the contract did not so obligate it. (Appendix B, page 25)

In pertinent part, the contract between petitioners (hereinafter called Contractor) and Johns-Manville Sales Corporation (hereinafter called Subcontractor) provided as follows:

"SECTION 5. The Contractor and Subcontractor agree to be bound by the terms of the General Conditions, Drawings and Specifications as far as applicable to this subcontract, and also by the following provisions:

"The Subcontractor agrees:

(a) To be bound to the Contractor by the terms of the General Conditions, Drawings and Specifications, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the Owner.

* * * * *

"The Contractor agrees:

(k) To be bound to the Subcontractor by all the obligations that the Owner assumes to the Contractor under the General Conditions, Drawings, and Specifications, and by all the provisions thereof affording remedies and redress to the Contractor from the Owner. * * *" (Appendix B, pages 25-26)

Section 30 of the General Conditions of the contract between the Contractor and the Owner (Ford Motor Company) provided as follows:

"CONTRACTORS RESPONSIBILITY FOR PERSONAL (30) INJURIES AND PROPERTY DAMAGE"

"The Contractor shall be exclusively responsible for and shall bear all loss and/or expense and/or damage and/or claims therefor against the Contractor and/or the Owner, resulting from bodily injury sickness or disease, including death at any time resulting therefrom, sustained by any person or persons, and/or on account of damage to or destruction of property, including loss of use thereof (except as otherwise specifically provided in the section hereof entitled 'Owner's and Contractor's Responsi-

> bilities—Fire and Certain Other Risks'), arising out of, or in connection with the performance of all work called for by this Contract, including all work assigned to the Contractor thereunder, based upon the alleged negligence of: (a) the Contractor or any of its employees, agents or servants; (b) any Subcontractor or any of such Subcontractor's employees, agents or servants; (c) and/or the Owner or any employees, agents, or servants of the Owner."
>
> (Appendix B, Page 26.)

The District Judge held that by Section 5(a) of the Subcontract, the Subcontractor assumed a parallel responsibility to the Contractor as that which the Contractor owed to the Owner. (Appendix B, page 27)

The District Court granted summary judgment to the Contractor from which judgment the Subcontractor appealed. No appeal was taken from the denial of Subcontractor's motion for partial summary judgment.

On appeal, the Court of Appeals reversed the judgment and directed the District Court to enter summary judgment for the Subcontractor. (Appendix B, page 24)

The opinion filed by the Court of Appeals holds that the language of Section 5(a) of the subcontract may not reasonably be interpreted to mean that the parties to the subcontract intended that the subcontractor be bound by the indemnity provisions of the General Conditions. (Appendix B, page 24)

A petition for rehearing *en banc* was filed and denied by order entered April 16, 1964. (Appendix B, page 16)

The petition for rehearing was denied by order entered April 27, 1964. (Appendix B, pages 15-16)

REASONS FOR GRANTING THE WRIT

The reasons why, in the opinion of petitioners, a Writ of Certiorari should be granted are discussed separately under the heading of the questions.

I.

MAY THE COURT OF APPEALS ORDER SUMMARY JUDGMENT FOR THE APPELLANT IF FACTUAL INFERENCES MUST BE DRAWN FROM UNDISPUTED FACTS IN ORDER TO RENDER SUCH JUDGMENT AND REASONABLE MINDS COULD DRAW DIFFERENT INFERENCES?

The opinion of the Court of Appeals conflicts with the rules of other Circuits that summary judgment is not proper if different inferences can be drawn by reasonable minds from undisputed facts.

In its decision, the Court of Appeals held that the language of Section 5(a) of the Subcontract was not intended to mean what it said. This was a factual inference drawn from the language of the Subcontract. In doing so, the Court of Appeals exceeded the permissible scope of review.

Summary judgment "should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. [Citations omitted] And this is true even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir., 1950).

See also, *White Park Telephone Co. v. Southern Bell Tel. & Tel. Co.*, 181 F.2d 341 (5th Cir., 1950); *Cameron v.*

Vancouver Plywood Corp., 266 F.2d 535, 539-540 (9th Cir., 1959).

As Professor Moore has pointed out,

> "* * * it is well established that although certain basic facts are undisputed, if factual inferences must be drawn from those facts in order to render judgment and reasonable minds could draw different inferences, then summary judgment is not proper." *6 Moore's Federal Practice*, §56.17[11], p. 2189.

The inference drawn by the Court of Appeals from a reading of the Subcontract is not the only inference that could be drawn by reasonable minds:

1. Reasonable minds could infer from the express language of Section 5(a) of the Subcontract that the parties meant what they said and intended that the Subcontractor be bound by the indemnity provision of the General Conditions.

Section 5(a) of the subcontract provides:

> "5 (a) To be bound to the Contractor by the terms of the General Conditions, Drawings and Specifications, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the Owner."

It should be noted that the "Standard Documents" of the American Institute of Architects includes the subcontract and that Section 5(a) of the Standard Form of subcontract adopted by the American Institute of Architects provides:

> "The Subcontractor agrees—
>
> "(a) To be bound to the Contractor by the terms of the Agreement, General Conditions of the Contract, the Supplementary General Con-

> ditions, the Drawings and Specifications, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the Owner." American Institute of Architects, Document No. A-401, 1958 Edition.

A leading treatise in the field of building and construction law has this to say about this form of subcontract:

> "The form of the subcontract is so drawn that the general conditions of the contract as between the owner and the contractor are, by reference, made a part thereof." Blake, *The Law of Architecture and Building* (2nd Ed., 1925) p. 160.

This rule of law was recognized and applied by the Court in *Harper v. Home Indemnity Company*, 140 So. (2) 653, 657 (La., 1962), a case which is in point here.

In that case a subcontract provided that the subcontractor was to be bound to the general contractor by the terms of the agreement, general conditions, drawings and specificatinos for the entire work so far as they related to the work undertaken in the subcontract and further that the subcontractor was to assume, toward the general contractor, in connection with the work covered by the subcontract, *all obligations the general contractor by those documents assumed toward the owner.* The Court held that this clause incorporated the prime contract (between owner and general contractor) into the subcontract by reference.

Thus, it is clear that to those engaged in the construction industry, including Johns-Manville, the purpose of Section 5(a) is to incorporate by reference the obligations owed by the contractor to the owner pursuant to the general conditions of the contract and make those obligations binding on the subcontractor.

Included in those obligations are the indemnity provisions of Section 30 of the General Conditions.

2. Reasonable minds could infer from the practical construction placed on the Subcontract by the parties that they intended the Subcontractor to be bound by the indemnity provision of the General Conditions.

There is no provision in the subcontract which expressly obligates the subcontractor, Johns-Manville, to purchase Contractual Liability insurance. Section 28 of the General Conditions, however, places such an obligation on the Contractor, Long.

Consequently, if it was intended between the parties to the subcontract that Section 5 (a) thereof incorporated by reference the General Conditions, a practical manifestation of that intention would be the purchase of Contractual Liability insurance by Johns-Manville in connection with the work it performed pursuant to the subcontract. (The sole purpose of obtaining such coverage would be to protect itself with respect to the broad indemnification provisions of Section 30 of the General Conditions.)

Johns-Manville did purchase such contractual liability insurance and consequently it should be bound by this action which shows that it, Johns-Manville, intended that

Section 5(a) of the subcontract incorporated the General Conditions by reference into the subcontract.

There is a dispute about the reasonable inferences to be drawn from the Subcontract and the actions of the parties. Consequently, as was pointed out by this Court in *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256, an appellate court which enters summary judgment under those circumstances exceeds its scope of review:

> "The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine." 334 U.S. 249 at 256.

II.

DOES THE EXPRESSED POLICY OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT TO DENY REHEARINGS EN BANC OF ALL CASES HEARD ORIGINALLY BY A PANEL CONTRAVENE SECTION 46 (c) OF TITLE 28, UNITED STATES CODE?

Section 46(c), Title 28, United States Code, provides:

> "Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consists of all active circuit judges of the circuit."

It has long been the expressed policy and practice of the Court of Appeals for the Sixth Circuit to deny a rehearing *en banc* where the original hearing was not *en banc*. *National Latex Products Co. v. Sun Rubber Co.*, 276 F.2d 167, 168 (6th Cir., 1960).

In *N.L.R.B. v. Cambria Clay Products Co.*, 229 F.2d 433 (6th Cir., 1956) and *Northwest Airlines, Inc. v. Glenn L. Martin Co.*, 229 F.2d 434 (6th Cir., 1956) the rule of the Sixth Circuit was stated as follows:

> "* * * in cases where the appeal was heard, and the judgment or order complained of, was decided by a regular court consisting of three judges only, a petition to rehear or to reconsider should not be considered by the Court en banc."

The decisional rule announced in the above cases is an undue restriction on the discretion granted to the members of the Court of Appeals by the statute and by the decision of this Court in *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 688.

In the latter case the Court said that the majority of the members of a given Court of Appeals must be left free to determine when a rehearing *in banc* should be ordered. 363 U.S. 685, 688.

It is submitted that the rule of the Sixth Circuit is an unreasonable restriction on the discretion of the members of the Court of Appeals to order rehearings *in banc* because it effectively prevents them from exercising this discretion in all cases except those originally heard *in banc*.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Sec. 46(c), Title 28, United States Code:

"Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges af the circuit."

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CHARLES REED, *Plaintiff,* THE TRAVELERS INSURANCE COMPANY, *Party Plaintiff,* v. JOHN C. LONG, MARSHALL LONG and ROBERT W. LONG, individually and a co-partnership, d/b/a Long Construction Company, *Defendants and Third Party Plaintiffs-Appellees,* JOHNS-MANVILLE SALES CORPORATION, *Third Party Defendant-Appellant.*	No. 15,167.

ORDER

(Filed April 27, 1964)

Before: WEICK, Chief Judge, PHILLIPS, Circuit Judge, and DARR, Senior District Judge.

The petition for rehearing does not contain anything new. The interpretation of the subcontract between Long

and Johns-Manville was the question for decision. Substantially the same arguments and views are presented in the petition to review as were made at the hearing on the appeal.

We have carefully considered the points made in the petition and adhere to the conclusions as expressed in our opinion.

The petition for rehearing is denied.

Enter: Leslie R. Darr,
Senior District Judge,
Sitting by Designation.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CHARLES REED, ET AL.,
v.
JOHN C. LONG, ET AL.,
v.
JOHNS-MANVILLE SALES CORPORATION.

No. 15,167.

ORDER DENYING MOTION FOR REHEARING BEFORE THE COURT EN BANC

(Filed April 16, 1964)

Before WEICK, Chief Judge, MILLER, CECIL, O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

A petition has been filed for a rehearing before the Court in banc of this case which previously has been decided by a panel of three Judges.

Upon consideration, it is ordered that the application for rehearing before the Court in banc de denied, and that the petition to rehear be disposed of by the panel of the Court which heard the case on appeal.

Approved for entry:

Harry Phillips,
Circuit Judge.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CHARLES REED,
Plaintiff,
THE TRAVELERS INSURANCE COMPANY,
Party Plaintiff,
v.
JOHN C. LONG, MARSHALL LONG and ROBERT W. LONG, individually and a co-partnership, d/b/a Long Construction Company,
Defendants and Third Party Plaintiffs-Appellees,
JOHNS-MANVILLE SALES CORPORATION,
Third Party Defendant-Appellant.

No. 15,167
APPEAL from the United States District Court for the Eastern District of Michigan.

OPINION OF COURT OF APPEALS FOR THE SIXTH CIRCUIT

Decided February 13, 1964.

Before: WEICK, Chief Judge, PHILLIPS, Circuit Judge, and DARR, Senior District Judge.

DARR, Senior District Judge. In the year 1956, John C. Long, Marshall Long and Robert W. Long, co-partners doing business as Long Construction Company [Long], contracted to erect an automotive plant for Ford Motor Company [Ford] at Wixom, Michigan.

On July 18, 1956, Long entered into a subcontract with Johns-Manville Sales Corporation [Johns-Manville], whereby Johns-Manville contracted to furnish the material and labor for that portion of the construction involved in the placement of acoustical ceiling.

On January 8, 1957, Charles Reed, while working for Johns-Manville, was injured in a fall on the hoist on which he had been carrying acoustical tile from the ground to the third floor of the building. Reed instituted suit against Long in a state court in Michigan alleging that he was injured by reason of the negligence of Long. The case was removed to the United States District Court for the East-

ern District of Michigan. Thereafter Long instituted a third-party action against Johns-Manville.

The third-party complaint, among other things, alleged that the subcontract by its terms incorporated therein by reference a provision of the contract between Long and Ford, the result of which required Johns-Manville to indemnify Long for any damage claimed by reason of Reed's injuries, even though such injuries were caused by Long's own negligence. Travelers Insurance Company [Travelers], who carried Johns-Manville's Workmen's compensation insurance, was added as a party-plaintiff. Thereafter all parties, including Johns-Manville, agreed that Reed was entitled to recover $30,000 for his injuries, $5,000 was to be paid to Travelers to reimburse it for money paid out to Reed under the Workmen's Compensation Law. A judgment was entered accordingly.

The controversy narrows down to the question of whether Section 30 in the contract between Long and Ford was incorporated into the subcontract between Long and Johns-Manville. It reads as follows:

> The Contractor shall be exclusively responsible for and shall bear all loss and/or expense and/or damage and/or claims therefor against the Contractor and/or the Owner, resulting from bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person or persons, and/or on account of damage to or destruction of property, including loss of use thereof (except as otherwise specifically provided in the section hereof entitled "Owner's and Contractor's Responsibilities—Fire and Certain Other Risks"), arising out of, or in connection with the performance of all work called for by this Contract, including all work assigned to the Contractor thereunder, based upon the alleged negligence of: (a) the Contractor or any of its employees, agents or servants; (b) any subcontractor or any of such Subcontractor's employees, agents or servants; (c) and/or the Owner or any employees, agents, or servants of the Owner.

The provisions of the subcontract providing for inclusions by reference, in accord with the General Conditions of the contract between Long and Ford, are as follows:

> SECTION 1. The Subcontractor agrees to furnish all material and perform all work as described in Section 2 hereof for SUPERSTRUCTURE, Divisional and Plant Office Building, Lincoln Division, Ford Motor Company at Novi, Michigan, Ford Motor Company Project 4387 for Ford Motor Company, hereinafter called the Owner, at Dearborn, Michigan, in accordance with the General Conditions of the Contract between the Owner and the Contractor, and in accordance with the Drawings and Specifications prepared by Smith, Hinchman & Grylls, Inc., hereinafter called the Architect, all of which General Conditions, Drawings and Specifications signed by the parties thereto or identified by the Architect, form a part of a Contract between the Contractor and the Owner and hereby become a part of this Contract.
>
> SECTION 5. The Contractor and Subcontractor agree to be bound by the terms of the General Conditions, Drawings and Specifications as far as applicable to this subcontract, and also by the following provisions:

The Subcontractor agrees:

> (a) To be bound to the Contractor by the terms of the General Conditions, Drawings and Specifications, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the Owner.

The appellee Long, as third-party plaintiff, interposed a motion for summary judgment as did appellant Johns-Manville.

The District Court's decision was made upon interpretation of the subcontract, particularly the inclusion therein by reference to the prime contract. The District Judge was of the opinion that Section 5(a) of the subcontract

clearly included in the subcontract by reference the obligations and responsibilities provided by Section 30 of the prime contract whereby Johns-Manville was bound to indemnify Long in the same manner as Long agreed to indemnify Ford. Upon this premise he sustained the motion for summary judgment made by Long and a money judgment for $30,000 over against Johns-Manville. The motion for summary judgment made by Johns-Manville was denied. From these judgments Johns-Manville appealed.

To determine the meaning of the subcontract in connection with its references to the prime contract presents a question of law to this Court, as well as it did to the District Court.

The parties agreed that it is within the law that there may be incorporated by reference into one contract portions of another contract provided such incorporations are in clear terms.

Section 1 of the subcontract is a declaration of the agreement and intention of the parties, clearly disclosing the understanding of the parties in including by reference into the subcontract the General Conditions of the prime contract. Leaving out the unnecessary words, Section 1 of the subcontract reads:

> SECTION 1. The Subcontractor agrees to furnish all material and perform all work as described in Section 2 . . . in accordance with the General Conditions of the Contract between the Owner and the Contractor, and in accordance with the Drawings and Specifications . . . all of which General Conditions, Drawings and Specifications signed by the parties . . . form a part of a Contract between the Contractor and the Owner and hereby become a part of this Contract."

The language used is clear and unambiguous. The clear meaning is that the reference to the inclusion in the subcontract of the General Conditions means the General Conditions pertaining to the furnishing of material and performing work in the placement of the acoustical tile and

no more. This specific declaration of the intention of the parties would necessarily be the pattern for the meaning of any other reference to the inclusion in the subcontract of the General Conditions of the prime contract.

It seems to us that the provisions in Section 1 of the subcontract are sufficient to establish that the intention of the parties in including therein by reference the General Conditions contained in the prime contract was to limit the General Conditions to those concerning the furnishing of material and the performance of all the work, thereby excluding Section 30 of the General Conditions.

However, we will consider the entire subcontract and see whether it is inconsistent with the views just above expressed.

No authorities are necessary to establish the well known rule that an entire contract should be looked to in undertaking to interpret or construe a portion thereof. The whole contract may be considered as reflecting the general intention of the parties which may give light upon the particular part of the contract that is in controversy.

It appears three times in the subcontract that the subcontractor is bound by the terms of the General Conditions, Drawings and Specifications of the prime contract. These references are found at Section 1, above discussed, and in the first paragraph of Section 5 and Section 5(a). The references to General Conditions are contained in the agreement between Long and Ford and refer to a document entitled "General Conditions for Lump Sum Construction Contracts," constituting a portion of the prime contract made between Long and Ford.

There are fifty-six General Conditions in the prime contract identified by figures and under a number of these figures there are General Conditions identified by letters of the alphabet. All these General Conditions apply to the construction of the entire building. The subcontract let to Johns-Manville was only for the placing of acoustical ceiling. It is clear from the face of the instruments that the inclusions in the subcontract of the General Conditions

were only those General Conditions applicable to the subcontract.

In a review of the subcontract, it is found that several items or provisions are included in the subcontract by specific reference to the items or provisions as contained in the General Conditions, Drawings and Specifications of the prime contract. Despite the fact that the broad inclusions in the subcontract of the Drawings and Specifications as contained in the contract between Long and Ford, the subcontract identifies the Drawings and Specifications to be used in the subcontract. These references will be found at Section 2, Article A, (1) (a) and (1) (b) and (2) and Section 2, Article B(4). Under Section 5 (m) (n) (o) a reference is made to the General Conditions of the prime contract concerning arbitration of disputes.

Several provisions are also included in the subcontract which are the same as in the General Conditions of the prime contract.

Some of these are a requirement to procure employer's liability and workmen's compensation insurance, public liability insurance and automobile liability insurance, all in the same amounts as are in the General Conditions. *Section 3, Article A of the subcontract.* At Section 3, Article B(a) (b) taxes are required to be paid as is the case in the General Conditions requiring Long to pay taxes. At Article C, entitled "Cleaning of Premises" the subcontractor is required to keep the premises clean where his work is done and leave the entire premises "broom clean" of any rubbish or debris, etc. General Conditions require Long to do the same thing as one of his obligations to Ford.

It is important to notice that the provisions duplicated concern requirements other than those applicable to the performance of the work.

It is quite significant that specific reference was made as to all Drawings and Specifications to be used in placing the acoustical ceiling and specific designation made to

General Conditions concerning arbitration. Why put in these itemized Drawings and Specifications, if it were intended for the subcontract to include all General Conditions?

There is one other provision in the subcontract that is quite helpful in determining the intention of the parties. The subcontract itself contains an indemnifying provision at Section 5(f), which is as follows:

> To indemnify and save harmless the Contractor against any loss or damage to property suffered by anyone through any act or omission on the part of the Subcontractor or anyone directly or indirectly employed by him.

Why would this provision for indemnification be placed in the subcontract if it were intended that the broad reference to the General Conditions would include Section 30 [a very broad and inclusive provision for indemnification], particularly since the provision at Section 5(f) of the subcontract contains one of the items of indemnification found in Section 30 of the General Conditions?

We would call attention to Section 5(a) of the subcontract hereinabove quoted, upon which the District Judge seemed to rely for his decision, and point out that the words "obligations and responsibilities" do not add to the strength of this provision. This statement is validated by the fact that this subsection 5(a) itself provides that the "obligations and responsibilities" are provided "by those documents," meaning the General Conditions, Drawings and Specifications. Therefore, the provisions of the first paragraph of Sections 5 and 5(a) are the same. Evidently Section 5(a) was added for clarity or repeated as being a part of the provisions to which "The Subcontractor agrees."

In considering the entire contract as shedding light upon the close association of the words "General Conditions" with the words "Drawings and Specifications" as appear in the first paragraph of Section 5 and Section 5(a), we are inclined to believe that the maxim *noscitur a sociis* would

apply, resulting in the intention of the meaning of General Conditions to be the same as the words "Drawings and Specifications." *66 C.J.S., pages 607-8* and many cases cited therein. Certainly Drawings and Specifications are limited to the method of performing the work and under the maxim *noscitur a sociis* the words "General Conditions" would be restricted to the same meaning.

We conclude that all the portions of the General Conditions, Drawings and Specifications of the prime contract intended by the parties to be included in the subcontract are actually written into the subcontract or are included by reference to certain itemized provisions of the prime contract, except directions for the buying of the material and performance of the work. This view definitely excludes inclusion of Section 30 of the General Conditions as being part of the subcontract. *Vanderlik-Locke Co. v. United States,* 285 F.2d 939 (1960), cert. denied 365 U.S. 860; *Alexander v. Fidelity & Casualty Co.,* 100 So.2d 347 (1958).

For the reasons stated, the judgments of the District Court are reversed with instructions that Long's motion for summary judgment be denied, that the judgment based thereon be vacated and that the motion for summary judgment made by Johns-Manville be granted and a judgment entered in its favor.

OPINION OF DISTRICT COURT

(Filed April 17, 1962)

Plaintiff, Charles Reed, a workman employed by Johns-Manville Sales Corporation, was injured when a hoist on which he stood was lowered without warning. Johns-Manville Sales Corporation then was performing work at the site of a Ford Motor Company project at Wixom, Michigan, pursuant to a contract it had executed with Long Construction Company, the general contractor.

Plaintiff brought suit against Long Construction Company for the injuries sustained which, he alleged, were caused by the negligence of Long Construction Company, one of whose employees operated the hoist. Thereupon, Long Construction Company brought in Johns-Manville Sales Corporation as a third-party defendant upon a claim of indemnity. The rights of plaintiff have been determined by stipulation, and there is now pending only the outcome of the third-party action.

The motions before the court place at issue the duty of Johns-Manville Sales Corporation, pursuant to the contract, to indemnify Long Construction Company against any claims for personal injury connected with the performance of the work, even though based upon negligence of Long Construction Company. To decide them, we must turn to the contract. In its first two sections, the work to be performed by Johns-Manville Sales Corporation is identified by reference to the General Conditions, Drawings, and Specifications of the contract between Ford Motor Company and Long Construction Company. In sections three and four there are provisions governing such matters as insurance, taxes, clean up, and overtime. In section five the working relationship between contractor and subcontractor is defined by reference to the General Conditions, Drawings, and Specifications of the general contract; yet some matters covered by the general contract are again treated by independent provisions of this section. The difficulty in ascertaining the intent of the parties arises from such double treatment.

Reference to the general contract in section five is made in the following words:

> "SECTION 5. The Contractor and Subcontractor agree to be bound by the terms of the General Conditions, Drawings and Specifications as far as applicable to this subcontract, and also by the following provisions:
>
> "The Subcontractor agrees:
>
> "(a) To be bound to the Contractor by the terms of the General Conditions, Drawings and Specifica-

tions, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the Owner.

* * * * *

"The Contractor agrees:

"(k) To be bound to the Subcontractor by all the obligations that the Owner assumes to the Contractor under the General Conditions, Drawings, and Specifications, and by all the provisions thereof affording remedies and redress to the Contractor from the Owner."

It is clear that the responsibility to indemnify the owner against claims to personal injury connected with the performance of work under the general contract, even though based upon the owner's negligence, has been assumed by the contractor by the indemnity provision of the general contract:

"The Contractor shall be exclusively responsible for and shall bear all loss and/or expense and/or damage and/or claims therefor against the Contractor and/or the Owner, resulting from bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person or persons and/or on account of damage to or destruction of property, including loss of use thereof (except as otherwise specifically provided in the section hereof entitled 'Owner's and Contractor's Responsibilities—Fire and Certain Other Risks'), arising out of, or in connection with the performance of all work called for by this Contract, including all work assigned to the Contractor thereunder, based upon the alleged negligence of: (a) the Contractor or any of its employees, agents or servants; (b) any Subcontractor or any of such Subcontractor's employees, agents or servants; (c) and/or the Owner or any employees, agents, or servants of the Owner."

It is equally clear that a parallel responsibility has been assumed by the subcontractor by subdivision (a) of section five. There should be no difficulty in the process of thought outlined. A mental substitution, in the indemnity provision, of the words "contractor," "subcontractor." "Sub-subcontractor," and "subcontract," for the words "owner," "contractor," "subcontractor," and "contract" respectively should be sufficient.

The thrust of the argument made by counsel for Johns-Manville Sales Corporation is that the provision in subdivision (f) of section five, an undertaking by the subcontractor "to indemnify and save harmless the Contractor against any loss or damageto property suffered by anyone through any act or omission on the part of the Subcontractor or anyone directly or indirectly employed by him," would be redundant unless intended to express fully its responsibility to indemnify Long Construction Company. They cite cases requiring a clear and unmistakable expression of intent to indemnify another against the results of his own negligence to support their argument. Speaking generally, the expression of such intent must be plain but there is no policy that prevents giving it effect. E. g., *Buffa v. General Motors Corporation*, 131 F. Supp. 478 (E.D. Mich. 1955). The performance of construction work exposes the men doing the work to hazards existing at the site, and the person for whom the work is done may seek protection against tort claims in connection with the work by a broad indemnity agreement. It is essential only that the nature of the agreement be made clear and unmistakable.

Here the General Conditions, Drawings, and Specifications of the contract between Ford Motor Company and Long Construction Company are made part of the subcontract for the purpose of identifying the work to be performed, but they also are intended to serve in defining the relationship between Long Construction Company and Johns-Manville Sales Corporation. In this respect, a Michigan case cited in argument may be distinguished. In *Arrow Sheet Metal Works v. Bryant & Detwiler Co.*, 338 Mich. 68, 61 N.W. 2d 125 (1953), the defendant had entered

into a contract with Ford Motor Company to do construction work. The plans and specifications, indicating in detail the manner in which the work was to be performed, were incorporated in the general contract. Plaintiff, a subcontractor, sued for the recovery of additional compensation, on the ground that the defendant had failed to perform its responsibility of coordination and supervision, a responsibility arising under the general contract, so that plaintiff's work could not be performed within a reasonable time. The court held that the reference to the plans and specifications contained in the general contract was made only for the purpose of identifying the work to be done. It also expressed the rule that would apply if the reference had been made for the purpose of defining the relationship of the parties:

> "All provisions of the agreement between the parties hereto must be construed together in such manner, if possible, as to avoid a conflict. If such avoidance is not possible, the express terms of the agreement must control as against implications based on the reference to the plan and specifications contained in the general contract." (388 Mich. at 76.)

To the extent that the independent provisions of the subcontract conflicted with any parallel that might be drawn from the general contract, we would not hesitate to give such independent provisions controlling force, but here we do not have a conflict, only an implication that the independent provision fully expressed the intent of the parties.

More in point is *Frommeyer v. L. & R. Construction Co.*, 261 F. 2d 879 (3d Cir. 1958). There the question was whether the amount to be paid to a subcontractor was subject to reduction where the owner, the Government, had exercised its right to make changes in the plans and specifications that eliminated certain work. The parties did intend their responsibilities to be determined by reference to the general contract, and they included a specific provision in the sub-contract on the matter of extra work:

"Extra work is to be performed by you as directed by us or the U. S. Engineers and such work shall be subject to the approval of the U. S. Army Engineers as to performance and amount and time of payment."

This might be thought redundant, as the general contract contained a broader provision:

"3. Changes and Extras.—The contracting officer may at any time, in writing, and without notice to the sureties, order extras or make changes in the drawings and/or specifications of this contract providing such extras or changes are within the general scope thereof. If any such extra or change causes an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly."

It might be argued that the specific provision ought to be read as a full expression of intent of the parties, but the court applied the broad language of the general contract and allowed an adjustment in the amount to be paid under the subcontract. The decision of the Third Circuit was sound. Where reference to the general contract is made for the purpose of defining the responsibilities of the parties and there is no conflict between the provisions of the general contract as applied to the parties and the provisions they have made independently, all should be given effect.

Therefore, the motion of Long Construction Company for summary judgment should be granted, and the motion of Johns-Manville Sales Corporation for partial summary judgment denied.

/s/ Fred W. Kaess,
United States District Judge.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 253

JOHN C. LONG, MARSHALL LONG and
ROBERT W. LONG, individually
and a co-partnership, d/b/a
LONG CONSTRUCTION COMPANY,
Petitioners,
vs.
JOHNS-MANVILLE SALES CORPORATION,
a foreign corporation,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF JOHNS-MANVILLE SALES CORPORATION IN OPPOSITION

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BRIEF OF JOHNS-MANVILLE SALES CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 327 F2d 611, and is printed on pages 17-24 of petitioners' brief and appendix. The opinion of the District Court is reported at 204 F. Supp. 16, and is printed on pages 24-29 of petitioners' brief and appendix.

JURISDICTION

The opinion of the Court of Appeals was filed on February 13, 1964. A petition for rehearing *en banc* was denied April 16, 1964, and a petition for rehearing before the three-judge division which heard the appeal was denied April 27, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE AND RULE INVOLVED

Title 28 U.S.C. §46(c) provides:

> "Cases and controversies shall be heard and determined by a Court or division of not more than three judges, unless a hearing or rehearing before the Court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active judges of the circuit."

Rule 56, Federal Rules of Civil Procedure provides in part:

> "(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

QUESTIONS PRESENTED

1. Does the opinion of the Court of Appeals reflect a conflict between the Sixth Circuit and other Circuits as to the principles governing summary judgments pursuant to Rule 56, Federal Rules of Civil Procedure?

2. Did the Court of Appeals err in denying petitioners' motion for rehearing en banc?

STATEMENT

In 1956, petitioners John C. Long, Marshall Long and Robert W. Long, co-partners doing business as Long Construction Company (hereinafter referred to as "Long"), contracted to erect an automotive plant for Ford Motor Company (hereinafter referred to as "Ford") at Wixom, Michigan. The contract between Long and Ford included an indemnity agreement under which Long agreed to indemnify Ford for any injuries arising out of or in connection with the performance of the work, even though such injuries may have been caused by Ford's own negligence. Subsequently, Johns-Manville Sales Corporation (hereinafter referred to as "Johns-Manville") entered into a subcontract with Long whereby Johns-Manville undertook to furnish the material and labor for that portion of the construction involving the placement of acoustical ceiling tile. The subcontract provided in part:

> "SECTION 1. The Subcontractor agrees to furnish all material and perform all work as described in Section 2 hereof for SUPERSTRUCTURE, Divisional and Plant Office Building, Lincoln Division, Ford Motor Company at Novi, Michigan, Ford Motor Company Project 4387 for Ford Motor Com-

pany, hereinafter called the Owner, at Dearborn, Michigan, in accordance with the General Conditions of the Contract between the Owner and the Contractor, and in accordance with the Drawings and Specifications prepared by Smith, Hinchman & Grylls, Inc., hereinafter called the Architect, all of which General Conditions, Drawings and Specifications signed by the parties thereto or identified by the Architect, form a part of a Contract between the Contractor and the Owner and hereby become a part of this Contract."

"SECTION 5. The Contractor and Subcontractor agree to be bound by the terms of the General Conditions, Drawings and Specifications as far as applicable to this subcontract, and also by the following provisions:

The Subcontractor agrees:

(a) To be bound to the Contractor by the terms of the General Conditions, Drawings and Specifications, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the Owner.

* * *

(f) To indemnify and save harmless the Contractor against any loss or damage to property suffered by anyone through any act or omission on the part of the Subcontractor or anyone directly or indirectly employed by him."

On January 8, 1957, during the construction of the building, Charles Reed, an employee of Johns-Manville, was injured in a fall on a hoist on which he had been carrying acoustical tile from the ground to the third floor of the building. Reed filed a Declaration against Long in the Circuit Court for Wayne County, Michigan, alleging that the hoist was operated by, and was under the exclusive control of Long, and that his fall and injuries were caused by

the negligence of Long, in that one of Long's employees lowered the hoist without warning, causing him to lose his balance and become straddled between the descending hoist and the wall of the building.

After removal of the case to the United States District Court for the Eastern District of Michigan, Long instituted a third party action against Johns-Manville, claiming that by the terms of the subcontract, which allegedly incorporated the indemnity agreement between Long and Ford contained in the prime contract, Long was entitled to indemnification for any loss, expense, damage or claim which might result from Reed's injuries, even though such injuries were caused by Long's own negligence.

By stipulation the parties agreed that plaintiff Reed should recover the sum of Twenty-five Thousand Dollars ($25,000.00) and that an intervening plaintiff, Travelers Insurance Company, the Workmen's Compensation insurer for Johns-Manville, should recover the sum of Five Thousand Dollars ($5,000.00) in full settlement of their respective claims in the principal action. Long thereafter moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, with respect to its claimed contractual right to indemnity under the provisionse of the subcontract. Johns-Manville filed a cross-motion for partial summary judgment with respect to the same issue. The motions were heard by U. S. District Judge Fred W. Kaess, who granted Long's motion and denied Johns-Manville's motion. An appeal was taken to the Court of Appeals for the Sixth Circuit from the judgment entered in favor of Long. The Court of Appeals reversed the District Court, holding that the subcontract did not evidence an intent by the parties to incorporate by reference the indemnity agreement between Long and Ford in the prime contract.

ARGUMENT

1. Does the opinion of the Court of Appeals reflect a conflict between the Sixth Circuit and other Circuits as to the principles governing summary judgments pursuant to Rule 56, Federal Rules of Civil Procedure?

A review of opinions from the Sixth Circuit shows that there is no substance whatever to the claim that this petition brings to the Supreme Court a conflict between the Sixth Circuit and other Circuits in the interpretation of Rule 56, Federal Rules of Civil Procedure. The rule that summary judgment may not be granted upon facts which are susceptible of different inferences is thoroughly recognized and consistently applied in the Sixth Circuit. See *Bohn Aluminum & Brass Corporation v. Storm King Corporation,* (6 Cir. 1962) 303 F 2d 425; *S. J. Groves & Sons Company v. Ohio Turnpike Commission,* (6 Cir. 1963) 315 F 2d 235, cert. den. 375 U.S. 824, and cases cited therein.

Part I of petitioners' brief is essentially an argument that Johns-Manville should not have prevailed in the Court of Appeals, but it contains no supporting arguments or authorities for the assertion on page 7 that the Sixth Circuit is at variance with the other Circuits as to the general principles which govern summary judgments. This petition, we contend, presents a claim of error in application of the law to the particular facts of this case; it does not present a claim that the Sixth Circuit is laboring under a fundamental misconception of what the applicable law is.

Concerning the merits of the Appellate Court's decision, it should be kept in mind that well-settled principles of law dictate that contracts allegedly indemnifying against the indemnitee's own negligence are construed strictly against

the indemnitee. As stated in 27 Am. Jur., Indemnity, Section 15:

> "It is well settled that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting to him through his own negligent acts, where such intention is not expressed in unequivocal terms. Public policy has been said to require such contracts to be restricted rather than extended, and the liability of the indemnitor is regarded as so hazardous, and the character of the indemnity so unusual, that there can be no presumption that the indemnitor intended to assume it in the absence of express stipulation."

Many cases applying this rule are collected in annotations in 143 A.L.R. 312, 315 *et seq.*, and 175 A.L.R. 8, 29 *et seq.* In the latter annotation the author states:

> "While this rule of construction is expressed by the Courts in various forms, all of them in effect say: 'A contract of indemnity will not be construed to indemnify a person against his own negligence where such intention is not expressed in "clear and unequivocal terms."'" 175 A.L.R. at p. 30.

It is likewise an accepted rule that interpretation or construction of a contract is a question of law, for the Court and not for the jury, unless the contract is ambiguous or unclear. 53 Am. Jur., Trial, §266. But when the subject for decision is a contract allegedly indemnifying against another's own negligence, ambiguous or unclear language is insufficient as a matter of law. Therefore, the conclusion is inescapable that the petitioners in this case must succeed or fail as a matter of law. There is no middle ground upon which the meaning of the subcontract can be decided by a jury.

Senior District Judge, Leslie R. Darr, speaking for the Court of Appeals, expressly held this issue to be a question of law, saying:

> "To determine the meaning of the subcontract in connection with its references to the prime contract presents a question of law to this Court, as well as it did to the District Court." 327 F 2d at p. 613.

It is therefore not significant that Johns-Manville did not file a cross-appeal from the denial of its motion for partial summary judgment. Since the issue is strictly one of law, the Court's decision against Long necessarily requires a decision favorable to Johns-Manville. The Court's finding that as a matter of law Section 5(a) of the subcontract did not incorporate Section 30 of the prime contract obviously leaves no room for the subsequent submission of the same issue to a jury as a question of fact. Consequently, it was proper for the Court of Appeals to direct the granting of Johns-Manville's motion.

The Court of Appeals' decision is supported by *Alexander v. Fidelity & Casualty Co.*, (Miss. 1958) 100 So. 2d 347, and *Fanderlik-Locke Co. v. United States*, (10 Cir. 1960) 285 F 2d 939, *cert. den.* 365 U.S. 860, which involved incorporation-by-reference issues based upon the identical language relied upon by Long. Authorities cited in petitioners' brief have been read and analyzed, and we submit that they cast no doubt on the correctness of the Court of Appeals' disposition of this case.

2. Did the Court of Appeals err in denying petitioners' Motion for Rehearing En Banc?

The statement at page 12 of petitioners' brief that this Court held in *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 688, that "* * * the majority of the members of a given Court of Appeals must be left free

to determine when a rehearing *in banc* should be ordered" is inaccurate. The decision in that case was that a retired Circuit Judge was not eligible to participate in the decision of a case on rehearing *en banc*, under 28 U.S.C. §46(c). There was no indication of an intent to modify the statement in *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 250, that

> "In our view, §46(c) is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power. It vests in the court the power to order hearings *en banc*. It goes no further. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing *en banc*. The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a rehearing."

We note that this statement has been recently reaffirmed in *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 4-5.

Secondly, it is not correct that the Sixth Circuit unreasonably restricts rehearings *en banc* to those cases which were originally heard *en banc*. We understand the Sixth Circuit's previously announced policy to mean that the original division of three judges who decided the case shall consider a motion for rehearing *en banc*, and that they may order such a rehearing in any case in which they deem it appropriate.

Finally, this issue is purely academic because petitioners' motion for rehearing *en banc* was in fact considered by the six active Circuit Judges for the Sixth Circuit, as shown in the Order denying the motion, printed at page 16 of petitioners' brief and appendix.

CONCLUSION

This is not a proper case for granting certiorari because (1) there are not "special and important reasons therefor" within the guide-lines stated in Rule 19 of the Supreme Court Rules, and (2) the Court of Appeals correctly decided this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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